IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07-10-2005

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE N. KANNADASAN

O.S.A.NO.187 OF 2000

1. M/s. Batliboi & Company Ltd.,
   Bombay 400 001. rep. by its
   Managing Director
   Mr. Nirmal Bhogilal.

2. M/s. Batliboi & Co. Ltd.,
   represented by its
   Assistant General Manager
   Mr. Sharma
   25, Royapettah High Road,
   Madras 600 014. .. Appellants/Defendants

Vs.

M/s. Beama Manufacturers P. Ltd.,
Madras 600 058. represented by
one of its Directors
Mr.M.B. Kuttappa .. Respondent/Plaintiff

Appeal filed under Order 36, Rule 1 of O.S. Rules read with Clause 15 of the Letters Patent against the judgment and decree made in C.S.No.664 of 1995 dated 12.4.2000 passed by the learned single Judge.

For Appellants : Mr.V. Ramachandran
Senior Advocate for
Mr.K. Mani

For Respondent : Mr. Rathina Asokan

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J U D G M E N T

The present appeal has been filed by the defendants against the decree of the learned single Judge in C.S.No.664 of 1995 dated 12.4.2000.

2. The plaintiff / respondent filed the aforesaid suit for realisation of a sum of Rs.54,87,973/- with interest at the rate of 24% on the principal sum of Rs.54,87,973/- from the date of the suit till payment.

3. The plaintiff, a private limited company, is a registered Small Scale Industry manufacturing domestic/industrial/agricultural monoblock electric motor pump sets under the brand name 'BEACON' under the licencee Agreement from Best & Crompton, who are the owners of such trademark. The first defendant is a commercial trader engaged in selling and distributing various goods. The first defendant was the dealer of the plaintiff in respect of the aforesaid pump sets throughout India during the period from 1985 to 1993. On the basis of the comprehensive orders placed by the first defendant, the plaintiff used to despatch the goods to various branches and at times the various branches are directly placing orders with the plaintiff. The plaintiff under the advice of the first defendant used to raise the invoices in the name of the concerned branches and the original invoices along with the Hundis were being sent to the second defendant for payment. As per the instruction of the first defendant, all payments were to be made by the second defendant, namely, the Madras Branch of the first defendant. Initially, the Hundi was raised in favour of the second defendant giving 45 days time. Subsequently, such time limit was revised to 60 days and ultimately to 75 days. "On many occasions the second Defendant honoured the Hundi after the due dates, for which they have duly paid proportionate interest at the rate charged by the Nationalised Bank." The plaintiff had been availing bill discounting facility from the Bankers for which the plaintiff was required to pay interest to the bank at the rate of 24% per annum. All the payments made by the second defendant in respect of total supplies received by all the branches of the first defendant had been fully given credit as and when such amounts have been realised by the plaintiff. During the year 1993, the second defendant found it difficult to make payments and became irregular and delayed in making payments to the plaintiff and, consequently the plaintiff was forced to stop supplying the

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goods to the first defendant. The last consignment was on 11.9.1993, after which the plaintiff stopped supplying the goods because of the poor and irregular payment from the second defendant. Since the second defendant found it difficult to make payments, the first defendant issued directions to all the branches to return the unsold goods to the plaintiff. As a gesture of the goodwill, the plaintiff accepted the goods from the branches, which were returned between September 1993 and March 1994. The first defendant raised consolidated invoices to the tune of Rs.25.49 lakhs, being the value of the returned goods. The plaintiff had to pay the freight charges while taking delivery of the returned goods. It was also found that many of the goods were damaged and the plaintiff had to rectify the damages by incurring expenditure of Rs.3.03 lakhs and the freight charges paid by the plaintiff was to the tune of Rs.78,327/-. According to the plaintiff, the aforesaid amount is payable by the defendants. Besides the aforesaid amounts, the plaintiff is entitled to receive various amounts from the defendants and on reconciliation of accounts, the defendants were liable to pay Rs.80,01.956/- as on 30.9.1993. The value for the returned goods fixed at Rs.25,49,409/- had been given credit to by the plaintiff. The first defendant by letter dated 15.4.1994 acknowledged the liability at Rs.80,01,956/- as on 30.9.1993 and also admitted the credit of Rs.25,49,409/-. Subsequently the defendants had paid Rs.10,29,599/- on 25.4.1994, which was credited in the books of account. The defendants by letter dated 14.5.1994 admitted the liability of Rs.44.23 lakhs after giving credit of Rs.10,29,599/- paid by them. Subsequently, on 1.7.1994, the second defendant paid a further sum of Rs.6,09,178.85 and the first defendant paid a further sum of Rs.5,03,338.75 on 7.7.1994 and made a last payment of Rs.5,97,770/- on 22.7.1994 and did not pay any further amount thereafter. Since the defendants were making delayed payments and the transactions were commercial in nature, the plaintiff is entitled to charge interest at the rate of 24$ on the outstanding amount and accordingly the plaintiff charged interest on the delayed payment upto September 1993 to the tune of Rs.9,19,463/-, which was duly entered in the books of account of the plaintiff as on 30.9.1993 along with the then principal amount of Rs.80,01,955.93. The plaintiff was entitled to charge interest at the rate of 24% for the amount retained by the defendants from 1.10.1993 to 24.4.1995, the date of filing of the suit, on the outstanding amount due and payable by the defendants. A sum of Rs.14,74,523/- is payable on such head. Accordingly in the plaint, the following calculation

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was made by the plaintiff regarding the amount payable :-

1) Principal amount due after giving credit for returned goods as on 23.7.94	..	Rs.27,12,660/-
2) Interest at 24% per annum on the delayed payment upto September, 1993 on the then outstanding	..	Rs. 9,19,463/-
3) Interest at 24% per annum on the proportionate principal amount remained on various dates from 1.10.03 to 22.7.94 on which date last payment was received.	..	Rs. 9,84,015/-
4) Interest at 24% per annum from 23.7.94 to 24.4.95 to Rs.27,12,660/-	..	Rs. 4,90,508/-
Total	..	Rs.51,06,646/-

In addition to the above amount, the plaintiff is also entitled to a sum of Rs.3,03,000/- towards repair charges and Rs.78,327/- for freight charges. On the basis of the aforesaid calculation, the suit was filed for realisation of Rs.54,87,973/- along with 24% interest per annum on the said amount till the date of realisation. It is stated in the plaint that though the defendants had admitted their liability by letter dated 14.5.1994, they failed to pay the amount and ultimately lawyer's notice dated 8.2.1995 was issued. After some correspondence, the plaintiff sent letter dated 3.3.1995 to the first defendant enclosing the details of account showing the liability. Thereafter, the defendants sent reply dated 13.3.1995 stating that they were not liable to pay any amount. After exchange of notices and letters, the suit was filed on 24.4.1995.

4. The defendants in their written statement while admitting the basic averment that they were the dealers of the pump sets manufacturing by the plaintiff and transactions were effected between 1985 and 1993, claimed that the right of the defendants as the exclusive dealer of the pump sets was illegally terminated by the plaintiff for which the plaintiff was liable to pay compensation.

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Accordingly, the defendants made a counter claim of Rs.1,05,36,613.42 from the plaintiff. The defendants also specifically pleaded that they have not agreed for payment of any interest, and, therefore, they were not liable to pay interest.

5. A reply statement was filed by the plaintiff denying the averments regarding the counter claim made by the defendants.

6. Learned single Judge of this Court framed the following issues for determination :-

"1. Whether the plaintiff is entitled to a sum of Rs.54,87,973/- from the defendants ?

2. Whether the plaintiff is entitled to claim interest at the rate of 24% p.a. for the suit claim ?

3. Whether the defendants are entitled to the counter claim of Rs.1,05,36,613.42/- ?

4. To what relief ?"

7. Considering the issue Nos.1 to 3 together, the learned single Judge came to the conclusion that the amount of Rs.3,03,000/- and Rs.78,327/- claimed by the plaintiff towards repair charges and freight charges respectively was not tenable. However, the balance amount, including pre-suit interest at the rate of 24% per annum, was payable as the transactions were commercial in nature. Accordingly, the learned single Judge partly decreed the suit for a sum of Rs.51,06,646/- with 12% pendente lite and future interest. The counter claim filed by the defendants was dismissed as being devoid of any substance. Such decree has been challenged by the defendants in the present appeal.

8. The main contentions raised by the appellants are two fold. Firstly it is contended that the learned single Judge has committed illegality in rejecting the counter claim made by the defendants. The second submission is to the effect that even assuming any amount was due, in the absence of any contract providing for payment of interest and in the absence of any demand in writing, pre-suit interest was not payable. It is also submitted that in view of Section 34 CPC, pendente lite interest and future interest at the rate of 12% is also unjustified.

9. Learned counsel for the plaintiff / respondent

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has supported the decree of the trial court and has contended that since the transactions were commercial in nature and the plaintiff has to pay interest at the rate of 24% to the bank, the interest claimed by the plaintiff was justified.

10. The first question, which crops up for consideration, relates to validity of the counter claim. The basis of the counter claim seems to be the alleged illegal termination of the dealership of the defendants. The plaintiff's case is to the effect that the plaintiff stopped supplying of goods to the defendants in view of the irregular payments made by the defendants. It is not disputed that in view of such action taken by the plaintiff, the defendants returned the unsold goods. The learned single Judge has referred to the relevant materials on record and considered the fact that the defendants in their earlier communications to the plaintiff had not made any claim and only after the suit was filed for the first time, they came out with the counter claim on account of the alleged illegal termination of the dealership. Learned single Judge has also observed that the defendants did not produce any books of account to indicate about their alleged loss of turnover and in the absence of any acceptable material, the counter claim was not justified.

11. We have carefully gone through the evidence on record including that of the P.W.1 and other documentary evidence. We do not find any reason to differ from the conclusion reached by the learned single Judge on this aspect. Therefore, the counter claim was rightly rejected by the learned single Judge and there is no scope for interference in the rejection of the counter claim by the learned single Judge.

12. The other contention of the defendants relates to claim of interest by the plaintiff for the period anterior to the date of filing of the suit. The learned single Judge has upheld such claim on the ground that the plaintiff was required to pay interest to the bank for the facility obtained by the plaintiff, and, therefore, the defendants are liable to pay such amount to the plaintiff. Learned single Judge has observed that even though there is no written contract regarding payment of interest, since the transactions were commercial in nature and since the plaintiff was paying interest to the bank, there was every justification for the plaintiff to claim such interest.

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13. The claim relating to payment of interest in a suit for money can be made under three heads – (1) interest prior to the institution of the suit on the principal sum adjudged; (2)pendente lite interest on the principal sum adjudged from the date of the suit to the date of the decree; and (3) future interest on the principal sum adjudged from the date of the decree to the date of the payment.

14. So far as pendente lite and future interest are concerned, Section 34 of the Code of Civil Procedure is applicable. As per Section 34 of CPC, the court may order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree. So far as the future interest is concerned, the court may direct payment of interest not exceeding six per cent on the sum adjudged. The proviso to Section 34, however, makes it clear that where the liability in relation to the sum adjudged has arisen out of commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or when there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

15. Section 34 therefore covers the question of payment of pendente lite and future interest. However, payment of pre-suit interest depends not upon Section 34 CPC, but on the substantive law. Section 3 of the Interest Act, 1978 is relevant for the aforesaid purpose. The said provision is quoted hereunder :-

> "3. Power of court to allow interest.- (1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say, -
>
> (a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt

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is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings interest shall not be allowed under this section for the period after such repayment.

(2) Omitted being unnecessary for present purpose.

(3) Nothing in this section, -

(a) shall apply in relation to-

(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or

(ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement;

(b) shall affect-

(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or

(ii) the provisions of rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);

(c) shall empower the court to award interest upon interest."

16. Section 4 of the Interest Act, 1978 is as follows:-

"4. Interest payable under certain enactments. - (1) Notwithstanding anything contained in section 3, interest shall be payable in all cases in which it is payable by virtue of any enactment or other rule of law or usage having the force of law.

(2) Notwithstanding as aforesaid, and without prejudice to the generality of the provisions of sub-section(1),the court shall, in each of the following cases, allow interest from

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the date specified below to the date of institution of the proceedings at such rate as the court may consider reasonable, unless the court is satisfied that there are special reasons why interest should not be allowed, namely:-

(a) where money or other property has been deposited as security for the performance of an obligation imposed by law or contract, from the date of the deposit;

(b) where the obligation to pay money or restore any property arises by virtue of a fiduciary relationship, from the date of the cause of action;

(c) where money or other property is obtained or retained by fraud, from the date of the cause of action;

(d) where the claim is for dower or maintenance, from the date of the cause of action."

17. Since Section 4 starts with a non-obstante clause, the plaintiff would be entitled to pre-suit interest if interest is payable by virtue of any enactment or other rule of law or usage having the force of law. Even where Section 4 is not applicable, interest is payable by exercising the power under Section 3. But, such power would depend upon certain contingencies. If the claim is based on the debt payable by virtue of a written instrument at a certain time, such interest is payable from the date when the debt is payable to the date of institution of the proceedings. If the claim of interest is not based on any such written instrument, interest is payable from the date on which written notice is given by the person entitled to such amount. Under section 3(3)(a) the provision is however not applicable to any debt or damages upon which interest is payable as of right, by virtue of any agreement.

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18. A combined reading of the provisions contained in Sections 3 and 4 makes it clear that,
(1) interest is payable on a pre-suit claim, if there is any statutory enactment to that effect (provisions contained in the Negotiable Instruments Act or the Land Acquisition Act or specific instances where interest is payable under an enactment);

(2) interest is payable under other rule of law;
(3) interest is payable by virtue of any usage having

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the force of law;

(4) interest is payable as of right by virtue of any agreement as contemplated under Section 3(3)(a);

Keeping in view the fact that in Section 3 (3) the expression "agreement" has been used in contradistinction with Section 3(1)(a), where the expression "written instrument" has been used, it is obvious that such agreement contemplated under Section 3(3)(a) can be express agreement or even implied agreement.

(5) interest is payable if the claim relate to a debt payable by virtue of a written instrument at a certain time;

(6) interest is payable from the date of any written notice given by the person entitled to such claim.

It is however required to be noticed that in the matters coming within Section 4 of the Interest Act, 1978, it is mandatory for the court to award interest, whereas in the matters coming within the Section 3, it is discretionary for the court to consider the question of grant of interest.

19. The provisions contained in the Interest Act, 1978 are almost similar to the provisions contained in the Interest Act, 1839. While considering the question of payability of interest for the period prior to the date of filing of the suit, the Privy Council has decided in A.I.R 1938 Privy Council 67 (BENGAL NAGPUR RAILWAY CO. LTD. v. RUTTANJI RAMJI AND OTHERS) as follows :-

> "... The crucial question however is whether the Court has authority to allow interest for the period prior to the institution of the suit; and the solution of this question depends, not upon the Civil Procedure Code, but upon substantive law. Now, interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest, as for instance, under Section 80, Negotiable Instruments Act, 1881, the Court may award interest at the rate of 6 per cent per annum, when no rate of interest is specified in the promissory note or bill of exchange. There is in the present case neither usage nor any contract express or implied to justify the award

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of interest. Nor is interest payable by virtue of any provision of the law governing the case. Under the Interest Act, 32 of 1839, the Court may allow interest to the plaintiff, if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument."

It was further observed :-

> "... There is a considerable divergence of judicial opinion in India on the question of whether interest can be recovered as damages under Section 73, Contract Act, where it is not recoverable under the Interest Act. Now, Section 73, Contract Act, gives statutory recognition to the general rule that, in the event of a breach of a contract, the party who suffers by such a breach is entitled to recover from the party, breaking the contract, compensation for any loss or damage thereby caused to him. On behalf of the plaintiffs, reliance is placed upon Illus.(n) to that section. The illustration however does not deal with the right of a creditor to recover interest from his debtor on a loan advanced to the latter by the former. It only shows that if any person breaks his contract to pay to another person a sum of money on a specified date, and in consequence of that breach the latter is unable to pay his debts and is ruined, the former is not liable to make good to the latter anything except the principal sum which he promised to pay, together with interest up to the date of payment. He is not liable to pay damages of a remote character. The illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such interest under any provision of the law. Nor can an illustration have the effect of modifying the language of the section which alone forms the enactment."

20. The claim of the plaintiff / respondent to pre-suit interest is to be judged keeping in view the aforesaid principles. There is no dispute that in the present case, there is no written instrument, under which the debt is payable at a certain time. The plaintiff has also not specifically averred in the plaint that there was any agreement with the defendants regarding payment of interest or there is any usage having the force of law

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regarding payment of interest. It is of course vaguely asserted that the plaintiff was paying interest to the bank for the arrangement with the bank and the defendants were making such payment, but, in our opinion, the pleading is not clear about any usage having the force of law regarding payment of interest. Similarly the evidence to the effect that on few occasions interest is paid by the defendants does not have the effect of establishing a usage having the force of law. In the absence of any proof of agreement, either express or implied, or usage having the force of law regarding payability of interest, and in the absence of any written instrument, the claim of interest can be sustained only if it is proved that a written notice to that effect has been issued.

21. In the present case, admittedly no written notice was ever issued claiming interest at any point of time. Ex.P-25, which is the basis of the claim, does not provide for payment of interest. Even the accounts made by the plaintiff do not contain any entry regarding interest.

22. In such view of the matter, the appellants are right in their contention that no interest could have been claimed and decreed prior to the date of filing of the suit. So far as pendente lite and future interest are concerned, it is well settled that such matters are within the discretion of the Court. Therefore, the calculation of interest at the rate of 12% per annum during pendency of the suit and after the decree, which is based on discretion of the trial court, cannot be said to be arbitrary and in view of the decision of the Supreme Court in 1997(III) CTC 367 (MAHESH CHANDRA BANSAL v. KRISHNA SWAROOP SINGHAL AND ANOTHER), we do not find any reason to interfere with such part of the decree.

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23. Accordingly, while confirming the decree of the trial court regarding principal amount payable, we direct that no amount is payable towards interest for the period prior to filing of the suit. The decree of the learned single Judge is accordingly modified and the appeal is allowed in part. There is no order as to costs.

Dpk

Sd/

Asst.Registrar

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Sub Asst.Registrar

To

The Sub Assistant Registrar
Original Side, high Court
Madras.

+ one cc to Mr. Rathina Asokan, Advocate sr no. 41950
+ one cc to Ms. Anitha Sumath, Advocate sr 41945

GM(CO)
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